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No. 768

IN THE

Supreme Court of the United States

Term, 1970

THE BOYS MARKETS, INC.,

Petitioner,

v.

RETAIL CLERK'S UNION # 770,

Respondent.

BRIEF AMICUS CURIAE
of
Associated Industries of New York State, Inc.
In Support of Petitioner

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QUESTION PRESENTED

Whether a Federal District Court may temporarily enjoin a labor union strike in violation of a collective bargaining contract's no-strike clause.

INTEREST OF THE AMICUS CURIAE

This brief is filed pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States. Both counsel for petitioner and counsel for respondent have stated that the respective parties consent to the filing of this brief.

Associated Industries of New York State, Inc. has since its founding in 1914 served as the "Voice of Industry" in New York State. The Association has approximately 1,800

member companies having offices and plants in every part of the State of New York. Both manufacturing and non-manufacturing companies, representing total business activities of many billions of dollars annually, are included within the membership. While Associated Industries numbers among its members many of the largest corporations in America, the vast majority of its membership is composed of companies having a payroll of less than 200 employees. It therefore speaks for the small employer as well as the large and particularly so in the present situation where it is the small employer who is without adequate redress under the present state of the law.

The Association is filing this brief to emphasize to the Court the extremely important nature of this case and the effect that it will have not only on employers in New York State but throughout the nation in the event that the relief requested is not afforded.

ARGUMENT

Under the present state of the law as a result of the Sinclair case (Atkinson v. Sinclair Refining Company, 370 U.S. 195 (1962)) employers who negotiate a collective bargaining agreement containing a no-strike clause are precluded from obtaining temporary injunctive relief in federal district courts enjoining a union from striking over an arbitratable grievance in the contract. Presumably as a result of Avco (Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968)), an employer's rights to obtain such injunctive relief in the appropriate state court are severely circumscribed by the fact that the District Courts upon removal will dissolve the State court injunction and will not remand the litigation to the State court.

It is submitted that these holdings vitiate the true purpose of Section 301 of the Taft-Hartley Act (61 Stat. 156 (1947), 29 U.S.C. Section 185 (1958). This was eloquently pointed out by Justice Traynor in McCarroll v.

Los Angeles County District Council of Carpenters, 49 Cal. 2d 45, 315 P. 2d 322, 332 (1957). Cert. Denied. 355 U. S. 932 (1958) where he said,

> "The principal purpose of Section 301 was to facilitate the enforcement of collective bargaining agreements by making unions sueable and entities in the Federal Courts and thereby to remedy the one-sided character of existing labor legislation..... We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in State courts equitable remedies that had been available and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of Section 301."

It is argued that not only is Justice Traynor's rational applicable to enforcement in State's courts but should be equally applicable to enforcement by the Federal District Courts.

As a matter of fact logic and common sense dictate that if there are to be uniform doctrines of Federal Labor Law to be fashioned judicially in suits brought under Section 301 (Textile Workers v. Lincoln Mills, 353 U. S. 448) it is important that the disability of the Federal District Courts be removed. This was pointed out in the Sinclair (370 U. S. 195, 226) case in the dissenting opinion of Justice Brennan:

> "On the other hand if, as today's literal reading suggests and as a leading state decision holds, States remain free to apply their injunctive remedies against concerted activities in breach of contract, the development of a uniform body of federal contract law is in for hard times. So long as state courts remain free to grant the injunctions unavailable in federal courts, suits seeking relief against concerted activities in breach of contract will be channeled to the States whenever possible. Ironically, state rather than federal courts will be preferred instruments to

protect the integrity of the arbitration process, which Lincoln Mills and the Steelworkers decisions forged into a kingpin of federal labor policy. Enunciation of uniform doctrines applicable in such cases will be severely impeded. Moreover, the type of relief available in a particular instance will turn on fortuities of locale and susceptibility to process - depending upon which states have anti-injunction statutes and how they construe them."

While the employer still has a technical action for damages arising from a breach of a no-strike clause in a collective bargaining agreement, it is submitted that the relief is illusory. Particularly for a small employer even a short strike is a crippling experience and to obtain its end an employer is quite willing and usually does agree to waive any claim against the union for damages arising out of its violation of a no-strike clause in the collective bargaining agreement.

The inequality of the present posture of Court decisions in this regard is patent. On one hand the Court states that the employer's agreement to arbitrate is "the quid pro quo" for the union's agreement not to strike and therefore the employer's agreement is specifically enforceable, but on the other hand, the union's agreement not to strike is not specifically enforceable. Therefore in a collective bargaining agreement containing a no-strike provision the union's promise not to strike is in a practical sense illusory and therefore true mutuality of obligation is absent. This disparity of rights under present decisional law has been criticized by legal writers. See Aaron, Labor Injunction Reappraised, 10 U. C. L. A. Law Review 292, at pp. 342-3 (1963) and Gregory, The Law of Collective Agreement, 57 Michigan Law Review 635 (1959).

Nor is this view of mutuality of obligation a new concept. Recognition that collective bargaining agreements must be

valid, binding and easily enforceable by either party was recognized by the Congress at the time of passage of the Taft-Hartley Act.

> "If unions can break agreements with relative impunity, then such agreements do not tend to stablize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal Courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce."
>
> (Senate Report No. 105, 80th Congress, 1st Session, page 16).

The only way to achieve equality of employer and union in regard to the enforceability of collective bargaining agreements is to make such contracts equally binding and enforceable on both parties. This may be achieved by allowing employers in a proper case to apply to District Court for an injunction temporarily enjoining a union strike in violation of a collective bargaining contract containing a no-strike clause.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals be reversed.

Dated: February 20, 1970

Yours, etc.

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